upon those courts, by that instrument itself, to adjudicate and determine it. That right so given can neither be taken away nor that duty abrogated by the state of Colorado, by constitutonal provision or otherwise, and any attempt to do so is null and void. Such pretended constitutional inhibition is no part of the Constitution of the state of Colorado, and the judge's oath binding him to the support and enforcement of that instrument has no relation to such void provisions. The question may be brought by writ of error to this court for review, and from our judgment the cause may be taken for final determination to the Supreme Court of the United States itself. It cannot be reviewed by popular vote of the citizens of Colorado, or one of its municipalities; and any pretended constitutional provision of this state, assuming to provide such method of review, is null and void. To hold otherwise is not only to vest in the people of Colorado the power to nullify the United States Constitution, but is likewise to vest that tremendous power in every municipality of this state, having a population of 2,000 or more, which sees fit to bring itself within the terms of the home rule amendment to our Constitution."

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**Infants—Right of Action for Prenatal Injury.**—In Drobner *v.* Peters, 133 N. E. 567, the Court of Appeals of New York, held that an action by an infant for negligence resulting in prenatal injury is not sustainable under the principles of the common law, and without legislative sanction, and Penal Law, §§ 1050, 1052, as to injuries to a child quick in its mother's womb, sections 80, 81, as to producing miscarriage of a child not quick, and Code Cr. Proc. §§ 500, 505, preventing execution of a female quick with child, do not change the common law rule.

The court said in part: "Mr. Justice Holmes said in 1884, in Dietrich *v.* Northampton, 138 Mass. 14, 52 Am. Rep., 242, that no case, so far as he knew, had ever decided that an infant could maintain an action for injuries received in the mother's womb. The great weight of auauthority is still against the plaintiff's content on that the unborn child has a right of immunity from personal harm (Allaire *v.* St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176; Walker *v.* Great Northern Ry. Co., 28 L. R. Ir., 69; Gorman *v.* Budlong, 23 R. I., 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629; Buel *v.* United Rys. Co., 248 Mo. 126, 154 S. W. 71, 45 L. R. A. [N. S.] 625, Ann. Cas. 1914C, 613; Lipps *v.* Milwaukee, etc., Co., 164 Wis. 272, 159 N. W. 916, L. R. A., 1917B, 334), although much judicial argument has been advanced to support a contrary ruling (Nugent *v.* Brooklyn Heights R. R. Co., 154 App. Div. 667, 139 N. Y. Supp. 367; dissenting opinion, Boggs, J., Allaire *v.* St. Luke's Hospital, supra; Beven on Negligence [3d Ed.], 73, 76).

"In Quinlen *v.* Welch, 69 Hun 584, 23 N. Y., Supp. 963, it was held that a child at the time of the injury which caused the death, within

the meaning of the Civil Damage Act (Laws 1873, c., 646), and as such was entitled to maintain an action for injury in means of support against the person who sold intoxicating liquors to the father, but this court on appeal (Quinlan *v.* Welch, 141 N. Y. 158, 165, 36 N. E. 12) carefully declined as unnecessary to the decision either to approve or disapprove the views expressed by Haight, J., below. The reasons given to defeat recovery in such a case are: Lack of authority; practical inconvenience and possible injustice; no separate entity apart from the mother, and therefore no duty of care; no person or human being in esse at the time of the accident. They are not absolutely conclusive against the infant en ventre sa mere.

" 'The law in many cases hath consideration of him in respect of the apparent expectation of his birth.' 7 Coke Rep., 8b.

"By a legal fictition or indulgence, a legal personality is imputed to an unborn child as a rule of property for all purposes beneficial to the infant after his birth (The George & Richard, L. R., 3 Ad. & Ecc., 466), but not for purposes working to his detriment (Villar *v.* Gilbey [1907], A. C., 139, 145). By the criminal law, such being the solicitude of the State to protect life before birth, it is a great crime to kill the child after it is able to stir in the mother's womb by any injury inflicted upon the person of the mother (Penal Law, sec. 1050), and it may be murder if the child is born alive and dies of prenatal injuries (Clarke *v.* State, 117 Ala. 1, 23 South. 671, 67 Am. St. Rep. 157). If the mother with intent to produce her own miscarriage produces the death of the quick child whereof she is pregnant, she may be guilty of manslaughter. Penal Law (Consol. Laws, c. 40), sec. 1052. If the child is not quick, it may be felony to produce a miscarriage. Penal Laws, secs. 80, 81. If a female convict under sentence of death is quick with child she may not be executed. Code Crim. Proc., secs. 500, 505. Many authorities are collected in the comprehensive prevailing opinion below. While they tend to cloud the real issue, they are not controlling. Rights of ownership of property do not connote a duty of personal care to the inchoate owner, nor does the crime of causing the death of an unborn child connote liability to the child for personal injuries. When justice or convenience requires, the child in the womb is dealt with as a human being, although physiologically it is a part of the mother, but the law has been fairly well settled during its centuries of growth against the beneficence of an artificial rule of liability for personal injuries sustained by it.

"Does the present case permit the establishment by judicial decision of the rule that the innocent infant need not bear unrequited the consequences of another's fault? In the mother's womb he had no separate existence of his own. When born he became a person. He carried the injuries out into the world with him. His full rights as a human being sprang into existence with his birth. No longer may it be urged that the mother alone is injured. The presence of the

injured child refutes that theory. Did he succeed to his mother's rights?

"The modern tendency of decided cases is to ignore fictions and deal with things as they are. At common law a cause of action for personal injuries did not survive if death resulted from another's negligence or wrongful act. Lord Campbell's Act, passed in England in 1846, and followed generally in this State (Code Civ. Proc., sec. 1905), was necessary to correct this omission. May this court attach an unnatural meaning to simple words and hold independently of statute that a cause of action for prenatal injuries is reserved to the child until the moment of its birth and then accrues? The formulation of such a principle of legal liability against precedent and practice may be a tempting task, to which sympathy and natural justice point the way, but I cannot bring myself to the conclusion that plaintiff has a cause of action at common law. The injuries were, when inflicted, injuries to the mother. No liability can arise therefrom except out of a duty disregarded, and defendant owed no duty of care to the unborn child in the present case apart from the duty to avoid injuring the mother. Strong reasons of public policy may be urged both for and against allowing the new right of action. The conditions of negligence law at the present time do not suggest that the reasons in favor of recovery so far outweigh those which may be advanced against it as to call for judicial legislation on the question."

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**Libel and Slander—District Attorney's Statement to Officer Held Privileged.**—In Stivers *v.* Allen, 196 Pac. 663, the Supreme Court of Washington held that a United States district attorney's statement to plaintiff, in the presence of a United States secret service operative, indicating his belief that plaintiff had in his possession a "no-conscription circular," under such circumstances as to suggest a violation of the federal Criminal Code was not actionable, the situation being the same as if the words had been spoken directly to the secret operative, and the communication under the circumstances being absolutely privileged.

The court said in part: "'Defamatory words, uttered only to the person concerning whom they are spoken, no one else being present or within hearing, are not actionable, because it is necessary as an invariable rule that there be a publication of the defamatory words to someone other than the person defamed, to render the same actionable.' 17 R. C. L. 315.

"It seems plain, therefore, that we have here a case where one officer of the government used language in the presence of another officer of the government—no one else being present or within hearing, in so far as we are concerned with the question of the publication of such language—indicating his belief that appellant had in his possession a 'no-conscription circular' under such circumstances as to